University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, Except July, August and September, by the University of Pennsylvania Law School, at No. 8 West King St., Lancaster, Pa., and 34th and Chestnut Streets, Philadelphia, Pa.

SUBSCRIPTION PRICE, $2.50 PER ANNUM; SINGLE COPIES, 35 CENTS

NOTES

CONFLICT OF LAWS—MARRIAGE BETWEEN FIRST COUSINS—PA. ACT OF 1901—First cousins, domiciled in Pennsylvania, for the purpose of evading the Act of 1901[1] forbidding their marriage, went into Delaware, were married and then returned to Pennsylvania. The libel for a divorce sought by the wife on the ground that the marriage was null and void because of their kinship was dismissed. *Schofield* v. *Schofield.*[2]

The expression, "a marriage valid where celebrated is valid everywhere," has become a maxim of law. Its exceptions must be carefully considered in any case in which the maxim is apparently applicable as in the case under discussion.

[1] Act of 1901, June 24, P. L. 597, Section 1: "From and after the first day of January, 1902, it shall be unlawful for any male person and female person, who are of kin of the degree of first cousins, to be joined in marriage." Section 2: "All marriages contracted in violation of the provisions of the first section of this act are hereby declared void."

[2] 51 Pa. Superior Court 564 (1912).

1. If the marriage be polygamous or incestuous the courts of no Christian country will recognize it although it may have been valid by the law of the country where it was celebrated. Incestuous marriages, in the international sense, are those contracted by persons who are so nearly related that, by the common consent of all-Christendom, hey are to be regarded as immoral and contrary to the laws of nature. By that consent, persons lineally related, either in the ascending or descending line, and brothers and sisters as collaterals, are within the prohibited degrees.[3] These principles of international law would require a court to recognize a marriage which is incestuous (in the more remote degrees) by the statute of its own state, but which is lawful by the law of the place where it was celebrated.[4] There are decisions which have not followed these principles and they rest upon the ground that such marriages are against the moral policy of the state.[5]

2. Where a statute prohibits generally a class of persons from contracting matrimony and it indicates the legislative intent to impose a personal incapacity so to contract, within or without the state, a marriage celebrated abroad will not be recognized. The most striking and best illustration is the *Sussex Peerage Case.*[6] It involved the Act of Parliament which provided that no descendant of King George II should be capable of contracting matrimony without the consent of the reigning sovereign. Such a descendant did marry in Rome without the necessary consent

[3] Story, Conflict of Laws, 8th Edition, Section 114; Sutton v. Warren, 51 Mass. 451 (1845); Wightman v. Wightman, 4 Johns. Ch. 343, 348 (N. Y., 1820); Stevenson v. Gray, 17 B. Mon. 193, 208 (Ky., 1856); Jackson v. Jackson, 82 Md. 17, 29 (1895).

[4] Garcia v. Garcia, 25 S. D. 645 (1910); first cousins, residents of California, married there and the court in South Dakota refused to annul the marriage although it was incestuous according to the statutes of that state. Sutton v. Warren, *supra,* the marriage of nephew and aunt, voidable by the law of England, where it was celebrated, was recognized by the court in Massachusetts, although if it had been celebrated there it would have been void. Stevenson v. Gray, *supra,* is a still stronger case, for there the parties went outside of their domicile for the purpose of evading its law. *In re* Bozzelli, L. R. (1902) 1 Ch. Div. 751; the widow of an Italian married the brother of her deceased husband in Italy; all were domiciled in Italy, and in spite of English statutes regarding such marriages as incestuous, the court was obliged to recognize the marriage because of its validity according to the law of the domicile of the parties and "which is not stamped as incestuous by the general consent of Christendom." This case affirms the English doctrine, that matrimonial capacity depends upon the *lex domicilii,* first laid down in Sottomayor v. De Barros, L. R. 3 P. D. 1 (1877). In America the great weight of authority regards the *lex loci* as governing the question of capacity.

[5] U. S. v. Rodgers, 109 Fed. 886 (1901); an uncle and niece were lawfully married in Russia and in proceedings testing their right to enter this country the court refused to recognize the marriage because the statutes of Pennsylvania declared such marriage incestuous. Judge McPherson said: "the moral sense of this community would undoubtedly be shocked at the spectacle of an uncle and niece living together as husband and wife."

[6] 11 Cl. & Fin. 142 (1844).

of the sovereign and the House of Lords found no difficulty in coming to the conclusion that the marriage was invalid, principally because the special object of the statute could only be attained by declaring that the personal incapacity attended the descendant wherever he went. *Stull's Estate*[7] is cited as bearing out this exception, and, while it is true that in that case the statute,[8] which read, "the wife or husband who shall have been guilty of adultery, shall not marry the person with whom the said crime was committed," was construed to mean that "a personal incapacity to marry is imposed," it is submitted that the true ground of the case and the ground of decisions in other states upon similar statutes is that the statute represents a distinct policy of the state[9] not to recognize such marriages. And to put it upon the ground of incapacity gives it a smack of English law that is unnecessary and wholly un-American. Even the *Sussex Peerage Case* has been put on the "distinctive state policy" ground by at least one authority.[10]

3. Where a statute prohibits marriage between persons related in a certain degree expressly upon the ground that such marriages are "contrary to God's law" a marriage between such persons celebrated abroad will not be recognized. *Brook* v. *Brook*[11] involved a statute prohibiting a man from marrying the sister of his deceased wife as being "contrary to God's law," and in that case an English subject married his wife's sister in Denmark, validly according to the law of that place; but it was not recognized in England. Authorities differ as to the proper basis of the decision; some assign great significance to the words "contrary to God's law;"[12] others claim it as an application of the *lex domicilii* or that the statute represents a distinct policy of England.[13]

The three exceptions noted above are the only ones specifically pointed out by the court and it is submitted that they are not sufficiently broad or exhaustive. The third exception is plainly too restrictive, for it certainly cannot be necessary that, in order effectually to invalidate marriages between persons related in certain degrees (degrees more remote than those forbidden by international law) that the words "contrary to God's law" must appear in the statute. Instead of three exceptions there are really only two, *viz.*: the first, relating to polygamous or incestuous marriages; the second, where a marriage is valid according to the *lex loci* or the *lex domicilii*, it may nevertheless be denied validity because of a "distinctive state policy" of the forum.[14]

---

[7] 183 Pa. 625 (1898).
[8] Act of March 13, 1815, Section 9, 6 Sm. L. 286.
[9] See *infra*.
[10] Wharton, Conflict of Laws, 3d Edit., pp. 343, 356.
[11] 9 H. of L. 192 (1861).
[12] Com. v. Lane, 113 Mass. 458 (1873); Bishop, Marriage, Div. & Sep. (1891) Vol. 1, Sections 876–7–8.
[13] Wharton, pp. 327, 358; Minor, Conflict of Laws, 1901, p. 152.
[14] Wharton, p. 360.

Statutes prohibiting certain marriages may or may not embody a distinctive state policy as affecting the morals of society. Whether a particular statute does so or not, is a matter for the court to determine, in any case where the statute does not state, in so many words, that it was enacted from motive of public policy. The public policy of a state may be indicated in various forms, *viz.*: by a series of statutes upon allied subjects, by the previous decisions of the court, or the court itself may decide, as *res integra*, whether the particular statute represents a distinct state policy or not. There are several classes of marriages prohibited by statute, of such importance that they must be considered especially, as they bear out to some extent the "distinctive state policy" theory.

Statutes which provide that if a divorce be granted on the ground of adultery, the guilty person shall not re-marry in the lifetime of the innocent consort, have been interpreted according to two distinct lines of authority, *viz.*: (1) those states which give full sway to the rule of international law—a marriage valid where celebrated is valid everywhere—and therefore recognize the validity of a marriage of the guilty person who goes out of the state to evade its laws and returns;[15] (2) other states, Pennsylvania among them, give precedence to their domestic policy and disregard the international law.[16] Statutes forbidding marriage between white and black persons have resulted in a similar conflict. *Medway* v. *Needham*[17] decided that the public policy of Massachusetts against marriages between the races was not so strong as to oblige the court to declare invalid a marriage validly contracted outside the state. In *State* v. *Ross*[18] the parties to a mixed marriage which took place in South Carolina, which was also their domicile, came into North Carolina, where such marriages were prohibited. The court of that state, as might be expected, admitted that the state policy was very strong against such marriages. Here was an excellent chance to declare it invalid on the "distinctive state policy" theory, in spite of its validity according to either the *lex fori* or the *lex domicilii*, but the court thought that it was so strongly bound by the law of nations that it would have to recognize the validity of the marriage. The cases which gave precedence to the domestic policy are cited in the footnotes though it must be admitted that a few of them were decided also according to the *lex domicilii*.[19]

[15] Van Voorhis v. Bretnall, 86 N. Y. 18 (1881); Pondsford v. Johnson, 2 Blatchf. 51 (1847); Com. v. Lane, 113 Mass. 458 (1873); Phillips v. Madrid, 83 Me. 205 (1891); State v. Shattuck, 69 Vt. 403 (1896).

[16] Stull's Estate, 183 Pa. 625 (1898); Pennegar v. State, 87 Tenn. 244 (1888), a leading case; Williams v. Oates, 5 Iredell 535 (N. C., 1845); Marshall v. Marshall, 2 Hun 238 (N. Y., 1874), overruled by Van Voorhis v. Brentnall, *supra*.

[17] 16 Mass. 157 (1819).

[18] 76 N. C. 242 (1877).

[19] St. v. Bell, 7 Baxt. 9 (Tenn., 1872); Jackson v. Jackson, 82 Md. 1730 (1895) (dictum); Dupre v. Boulard, 10 La. Ann. 411 (1855); State v. Kennedy, 76 N. C. 251 (1877); Kinney v. Com. 30 Gratt. 858 (Va., 1878).

Coming back to the principal case, it is apparent that the question in the case narrowed down to whether the statute forbidding first cousins to be joined in marriage represented such a distinct state policy as to warrant the court in deciding that the legislature intended the statute to cover marriages contracted outside the state. The conclusion reached gives rise to the inference that there is no such public policy. The theory of "distinctive state policy" was only casually mentioned in a discussion of *Stull's Estate*. What the court did say was this: "Where a statute forbids marriage between certain persons, or classes of persons, merely upon the ground of expediency and not upon moral grounds, or such as would tend to outrage the principles and feelings of all civilized nations, the general rule as to the validity of foreign marriages prevails." If the present statute were enacted merely for expediency it is not apparent what it tends to expedite. The court correctly points out that a statute should not be given extra-territorial effect unless its language sufficiently indicates that such was intended. The present statute, because such intent was not apparent, is really a dead letter, for if its purpose be to prohibit certain marriages it will be effective only upon such first cousins living in those parts of this state so isolated, that the expenses of a journey to the "marrying parsons" of the neighboring states will be prohibitive.

The court seemed to disregard intentionally the case of *McClain* v. *McClain*,[20] decided only three years ago by the same judges and cited in the present case by counsel. In that case the same statute was involved by a marriage of first cousins celebrated within the state of Pennsylvania. It was there said, "The relationship of first cousin was not one of the degrees of consanguinity designated in the act of 1860 (a criminal statute prohibiting the marriage of persons within the degree of consanguinity or affinity therein prescribed, providing a punishment and declaring the marriage void) and it is evident that the legislature intended to add first cousins to the classes of persons between whom marriage is incestuous." Now, if the marriage is void because incestuous and punishable criminally, it is submitted that that is presumptively sufficient to indicate a distinct public policy that such marriage is not to be recognized no matter where celebrated.[21]

[20] 40 Pa. Super. 248 (1909).

[21] U. S. v. Rodgers, *supra;* Johnson v. Johnson, 57 Wash. 89 (1910). First cousins domiciled in Washington went into British Columbia and after being married returned to their domicile; the statutes of Washington declared such marriages incestuous and provided a punishment; the court held that the marriage was void, saying: "Marriages between parties so nearly related are prohibited in nearly all civilized countries, and, if argument in support of such a policy is needed, the fact that the only offspring of this marriage is deaf and dumb supplies it." Garcia v. Garcia, cited *supra*, is a case where the statute was quite similar, but the parties to the marriage were not domiciled in the state of the forum when the marriage was celebrated; the court decided that the statute did not authorize it to declare invalid a marriage valid according to the *lex loci* and *lex domicilii*. The court refused to express any opinion as to whether

It is apparent that the principal case has given an interpretation to the statute different from that laid down in the earlier case. Which is correct is doubtful, but it is submitted that the construction announced in the more recent case should be favored for several reasons. The Act of 1901 does not declare that the marriage of first cousins is incestuous, nor provide a punishment for its violation, nor refer to the Act of 1860, which prescribes the table of incestuous marriages; it strikes down the marriage from a purely civil, not a criminal, view point.

I. B.

CONTRACTS—FIXING RESALE PRICES—RESTRAINT OF TRADE —In *Ghirardelli Co.* v. *Hunsicker*,[1] the manufacturer attached to each can of his ground chocolate a label stating the prices at which the article could be retailed. Thus the case presented the simplest form of the "contract system" of maintaining fixed prices on the resale of a manufactured article. The other method of accomplishing this object is for the manufacturer to offer to refund a specified portion of the purchase money to dealers who maintain the retail prices designated by the producer. This type of contracts has been uniformly upheld; the courts saying the dealer was not bound to maintain the prices, he was merely offered an inducement to do so. *In re Green*;[2] *Walsh* v. *Dwight*.[3] In reality such agreements are held not to be an illegal restraint of trade because the consumer can sometimes purchase below the stated price, *i. e.*, some retailers will cut prices.

The suit was by a manufacturer against a retailer, who had bought his goods from a wholesaler, and the court had no trouble in deciding that the agreement between the jobber and the defendant was for the benefit of the plaintiff. This is certainly sound; as well as the disposition the court made of the manufacturer's contention that the trade name and secret process under which the article was put out took it out of the general rule and brought it under the exception in favor of patented articles, *Bement* v. *Nat. Harrow Co.*,[4] which was definitely settled against the vendors of proprietary articles in *Dr. Miles Med. Co.* v. *Park*.[5] But the court refused to follow the decision of the Federal Supreme Court in the case last cited as to the principal point—whether

---

the parties were punishable criminally for incest. Compare this reasoning with the language of Judge McPherson in U. S. Rodgers: "It seems to me to be impossible to recognize this marriage as valid in Pennsylvania, since a continuance of the relation here would at once expose the parties to indictment in the criminal court, ... In other words, this court would be declaring the relation lawful, while the court of Quarter Sessions of Philadelphia County would be obliged to declare it unlawful."

[1] 128 Pac. Rep. 1041 (Cal., 1912).
[2] 52 Fed. 104 (1894).
[3] 58 N. Y. Suppl. 91 (1899).
[4] 186 U. S. 70 (1902).
[5] 220 U. S. 373 (1911).